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NO. 59034-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Detention of

CURTIS POUNCY

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

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2. Is it ineffective assistance of counsel for an attorney to make an objection to the admission of admissible evidence simply because the court indicated that she would have sustained the objection if it were made on other grounds?

3. Did the trial court properly exercise its discretion by refusing to give a supplemental instruction defining "personality disorder" when there was no dispute regarding the meaning of this term, the definition of the term did not differ from ordinary usage, and when the jury instructions allowed the parties to argue their case, were not misleading, and they properly informed the jury of the applicable law?

4. Was Pouncy's right to jury unanimity violated by the introduction of evidence relating to his sexual attraction to children, when the State presented evidence of only one diagnosis which

met the statutory definition of mental abnormality, and when the State clearly elected the mental abnormality?

B. STATEMENT OF THE CASE

Curtis Pouncy is a serial rapist who targets vulnerable women, including women who are young, mentally ill, emotionally distraught, and asleep in their beds. Curtis Pouncy began raping and sexually assaulting women at an early age. From ages nine to thirteen, Pouncy fondled several females, including a nine-year-old neighbor girl and his brother's girlfriend who was sleeping. 8RP 76-77. 5RP 54. At age 13, Pouncy had sexual contact with his eight or nine-year-old niece. 8RP 72 At age 15, Pouncy was involved in a gang rape of an 18-year-old. 8RP 75.

In his teenage years and into early adulthood, Pouncy was living on the streets, committing burglaries and dealing drugs. 5RP 59. Pouncy estimated that he was committing two or three burglaries a day. 5RP 60. Some of these burglaries would lead to rapes. If Pouncy found a woman home during a burglary, he would "take advantage of the opportunity" by committing rape. 8RP 79-80. It is unclear how many rapes Pouncy committed during burglaries. In one evaluation, Pouncy admitted burglarizing a home

in late 1982 or early 1983 and finding a woman and two children alone in the home. 8RP 172-73. Pouncy raped the woman and did not stop until she started screaming. 8RP 173. Pouncy was never caught for this rape.

Pouncy admits that he associated with "pushers and pimps" and forced women to engage in sex acts against their will. 5RP 62. This included pointing loaded pistols at women's heads and threatening them unless they complied with his sexual demands. 5RP 62. Pouncy had admitted that he was "intensely aroused" by sexual violence. 6RP 61.

In 1980, Pouncy joined the military and married his 17-year-old girlfriend Kathy Strand. Shortly thereafter, the couple moved to Hawaii. While living in Hawaii, Pouncy attempted to rape a woman outside of a bar. 8RP 80-81. 8RP 173. No charges were ever filed against Pouncy for this offense.

Pouncy also raped his wife Kathy repeatedly during the short time that they were married. 8RP 174. When asked about this by an evaluator, Pouncy said "it was the best, better than any sex we had before." 8RP 78.

Pouncy was not caught for any of his sex crimes until 1982. On December 2, 1982, at approximately 7:30 a.m., thirteen-year-

old Elizabeth Stephens was at the Greyhound Bus station in downtown Seattle. 8RP 49. Stephens was looking for a friend when Pouncy drove up next to her and asked her to get into his car. 8RP 49. Stephens said she was not interested and Pouncy offered to help her look for her friend. 8RP 50. Stephens agreed and got into the car with Pouncy. 8RP 50.

Pouncy took Stephens to a neighborhood nearby and told her that he would rape her if she did not have sex with him. 8RP 50. When Stephens said she would scream, Pouncy told her that he was going to choke her. 8RP 50. Stephens struggled to get Pouncy off of her, and tried desperately to get out of the car. 8RP 50. Pouncy slammed the car door on her head, threatened to kill her, and put his hands around her neck to choke her. 8RP 50.

After raping Stephens vaginally and anally, Pouncy was interrupted by the police. 8RP 51. When questioned by the police, Pouncy lied and claimed that Stephens had consented to the sexual intercourse. 8RP 51. In a later interview, Pouncy admitted raping Stephens. 8RP 54. Pouncy said that he was cruising the streets of Seattle looking for a woman to have sex with. 8RP 54. Pouncy was charged for this offense but he was released in January of 1983.

On February 17, 1983, two students at Ridgecrest Elementary School in Seattle were walking to school when Pouncy pulled up alongside the car. Pouncy attempted to get the girls into the car with him, but they both ran away and told the school principal what happened. 8RP 70. The police arrived within minutes and saw Pouncy "slowing noticeably" while passing a group of students. 8RP 70. Pouncy was stopped and identified by the two girls. 8RP 71. Pouncy was arrested on the rape warrant for the Elizabeth Stephens' case and no charges were filed for this incident. While Pouncy repeatedly denied trying to get these girls into the car, while in treatment at the Special Commitment Center, he admitted that he tried to get these two girls into his car. 12RP 132.

Four days after being released from custody, Pouncy committed another rape. On February 26, 1983, Pouncy was cruising in his car when he saw 19-year-old Denise Allen walking down the street crying. 8RP 57. Allen was mumbling that someone had stolen her baby and she asked him for help. 8RP 58. Pouncy admitted later that he feigned sympathy in an attempt to take advantage of the situation and get her into his car. 5RP 49.

Pouncy took Allen to his apartment before they went out on a "date." 8RP 58. As Allen went to put on makeup, Pouncy came up behind her, put a knife to her throat and threatened to kill her. 8RP 56. Pouncy forced Allen to perform oral sex, and after she vomited, he raped her vaginally at knifepoint. 8RP 56.

After the rape, Pouncy threatened to kill Allen if she told anyone. 8RP 57. Before dropping her off at her house, Pouncy asked her if he could see her again. 8RP 57. In a later interview, Pouncy admitted that during the attack, he had considered taking Allen out into the woods and killing her. 8RP 61.

Despite the seriousness of these three offenses, Pouncy was again released from jail pending sentencing in the rapes. On April 4, 1983, Karen Berg was asleep in her bedroom when she awoke to find Pouncy on top of her, grabbing her around the neck. 8RP 82. Pouncy said that he was going to rape her and take the money from the house. 8RP 83. Berg fought back and began screaming. Her attacker fled, and she called the police immediately. The K-9 Unit responded the dog track led to Pouncy who was a few blocks from Berg's residence. 8RP 83. Pouncy was never charged for this offense.

Pouncy pled guilty to the Denise Allen and Elizabeth Stephens rapes. Instead of being sent to prison, Pouncy was given an opportunity for sex offender treatment and reintegration back into society at the Western State Hospital (WSH) Sexual Psychopathy Program. At first, Pouncy made progress in treatment. In fact, he did so well that in 1987, the treatment team recommended that Pouncy be given work release. 5RP 66. A short time later Pouncy committed a serious violation of the program rules when he was seen kissing a vulnerable psychiatric patient. 7RP 140-44. Pouncy was not terminated from the program at that point but was given another chance at treatment. 7RP 148.

Pouncy went on work release status in May of 1988. 7RP 154-55. But it soon became apparent that Pouncy was not willing to follow the conditions of his release. In June of 1988, the WSH program staff learned that Pouncy had picked up a hitchhiker, a serious violation of his conditions of release. 7RP 155-57. Pouncy was terminated from WSH and was sent to the Department of Corrections (DOC). 8RP 96.

In the early 1990s, Pouncy was given another chance at treatment. 8RP 97. Pouncy completed the Sex Offender

Treatment Program (SOTP) at the Twin Rivers Correctional Center in Monroe, and was given glowing reviews. 8RP 101-03. In May of 1996, Pouncy was granted parole and was released to live with his new wife on Vashon Island. 8RP 103.

When Pouncy was released, he had many positive sources of support in his life. Pouncy had a home, a wife, and a job. 8RP 140-41. Pouncy had financial resources, he was allowed to travel, and he had friends. 8RP 108-09. He was engaged in sex offender treatment and was communicating regularly with his CCO.

Despite this support, Pouncy was still unable to handle freedom in the community. He quickly began to engage in risky behaviors, including having multiple affairs with drug-addicted women, picking up a hitchhiker, violating curfew, and being terminated from a job for lying on the application. 8RP 113-14, 8RP 139, 8RP 144. Pouncy was also stopped by the police after he was seen prowling in the backyard of two homes. 8RP 116.

Pouncy committed two sex offenses while free in the community. In early 1997, Pouncy raped Meri Fagan, a friend of his wife. Fagan never reported what he had done. 6RP 130-39.

On July 28, 1996, Pouncy attended his SOTP group and reported "no deviant issues." 8RP 118-19. After leaving group,

Pouncy began cruising. Pouncy soon saw Angel Harper, a woman with serious mental health issues. Harper was walking along the street drinking chocolate milk. 8RP 119. Pouncy pulled up alongside her and he talked her into taking him to her nearby apartment. 8RP 120.

Once inside the apartment, Pouncy forced himself on Harper, grabbed her throat, and threatened to kill her. 8RP 121. Pouncy repeatedly tried to force Harper to have sexual intercourse with him. 8RP 121. Harper got away by jumping out a window and running to the manager's office for help. 8RP 121. Harper had visible injuries consistent with the attack, and Pouncy was arrested a short distance away. Pouncy was charged with rape and other offenses but the charges were reduced to two felonies and a misdemeanor offense. 8RP 136. Pouncy's parole was revoked and he was sent back to prison where he again completed the SOTP program.

Doctor Packard testified that Pouncy suffers from paraphelia NOS nonconsent, a mental disorder which fit the definition of "mental abnormality" under RCW 71.09. 8RP 164. Doctor Packard also diagnosed Pouncy with antisocial personality disorder. Doctor Packard concluded that Pouncy was a high-risk sex offender who

was likely to engage in predatory acts of sexual violence if not confined to a secure facility.

C. ARGUMENT

1. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM *IN RE ROBINSON* DO NOT CONSTITUTE A COMMENT ON THE EVIDENCE AND WERE PROPERLY WITHIN THE SCOPE OF CROSS-EXAMINATION

The appellant asserts that the trial court should not have permitted the State to use the findings of fact and conclusions of law from *In re Robinson* in its cross-examination of Doctor Wollert. These findings and conclusions were made by a trial judge in Yakima county on an unrelated SVP case. The judge in *Robinson* made findings of fact that Doctor Wollert's methodologies were not generally accepted in the scientific community. The State asked Doctor Wollert three questions regarding these findings of fact:

> Q: And in the Robinson case ---- I'm going to hand you what's been marked Exhibit 156. I want you to look at finding of fact number 19, which is on page four.
>
> A: Yes.
>
> Q: And it states, Dr. Wollert's methods of assessing the impact of age on recidivism are generally not accepted in the ----
>
> OBJECTION OVERRULED

Q: in the community of mental health professionals who evaluate and assess persons in SVP matters. This includes the use of Bayes thereom and Null hypothesis, right?

A: Yes, that's what the judge signed.

Q: And that's the finding of fact in this case, that your methodologies are not generally accepted in the scientific community, right?

A: That is what the judge signed.

Q: And when I asked you about that in your deposition, you said, geez, I didn't even know anything about that, right?

A: Right. I had not received a copy of that, so that it was new information to me, yes.

16RP 160-61.

Pouncy argues that allowing the State to cross-examine Doctor Wollert regarding these findings and conclusions amounted to a judicial comment on the evidence.

This argument fails. Cross-examination of an expert witness regarding past SVP cases in which his methodologies were rejected by another court was appropriate. This information was relevant to the jury in evaluating the weight to give Doctor Wollert's testimony, and it did not constitute a comment on the evidence.

a. The State's Questioning of Doctor Wollert Regarding the Yakima County Case Was Appropriate Cross-Examination

It is well established that wide latitude should be permitted in cross-examination of an expert, and the trial court has the discretion to determine the exact scope of the examination. *Tegland, 5B, Section 705.7 (Fourth Edition)* . ER 705 allows the opposing party to probe the knowledge and qualifications of the witness, as well as the basis for the witness's opinion. *Tegland, 5B, Section 705.7 (Fourth Edition).* Trial courts have broad discretion in determining the scope of cross-examination, particularly with respect to the examination of experts. *In re Griffith,* 136 Wn. App. 480, 485, 150 P.3d 577 (2007). *Falk v. Keene Corporation,* 53 Wn. App. 238, 247, 767 P.2d 576 (1989).

A party has the right to liberal cross-examination on issues of bias, hostility, or interest. *State v. Robbins,* 35 Wn.2d 389, 395-96, 213 P.2d 310 (1950). Any error in allowing cross-examination is reversible only if it affected the outcome of the trial. *Griffith,* 136 Wn. App. at 485.

Courts have routinely held that cross-examination of expert witnesses, "should be liberalized rather than restricted." *Dinner v. Thorpe,* 54 Wn.2d 90, 96, 338 P.2d 137 (1959); *Levine v. Barry,*

114 Wash. 623, 195 P. 1003 (1921). The *Levine* court explained the rationale for this rule:

> The expert witness, because of his superior knowledge of the subject about which he is testifying, may be very useful or a very misleading, or even dangerous, witness, and as to him the rules of cross-examination should be liberalized rather than restricted. We think the general practice in the trial courts of this state has been in accordance with the views we have announced, and that such practice has grown up because it tended to bring about justice.

Levine v. Barry, 114 Wash. at 631. It is within the discretion of the trial judge to decide whether the cross-examination is relevant to test the competency, credibility, knowledge, memory or accuracy of the witness. *City of Renton v. Scott Pacific Terminal Inc.,* 9 Wn. App. 364, 512 P.2d 1137 (1973).

In *In re Griffith,* 136 Wn. App. 480, 485 (2007), an SVP case, the appellant alleged that the State should not have been permitted to cross-examine his expert about a case where he had testified the offender did not meet criteria, and the offender had gotten out and reoffended. *Griffith,* 136 Wn. App. at 484. The court rejected this argument on the grounds that the trial court did not exceed the "wide discretion" that it was given in this area. *Griffith,* 136 Wn. App. at 485.

In this case, the State was entitled to cross-examine Doctor Wollert regarding the Yakima County case. It was particularly appropriate given the fact that Doctor Wollert *utilized the very same methodologies that he used in this case.* The fact that another court found that these methodologies did not meet the basic threshold standards for admissibility is relevant to the competency and credibility of this expert witness. As in *Griffith*, the trial court in this case properly exercised its discretion.

Even if the court were to determine that the cross-examination questions were inappropriate or improper any error that resulted would be harmless. *State v. Lopez,* 95 Wn. App. 842, 855-56, 980 P.2d 224 (1999); *Griffith,* 136 Wn. App. at 485 (any error in allowing the cross-examination is reversible only if it affected the outcome of the trial). In *Lopez,* the appellant argued that the court erred by allowing improper impeachment by the prosecutor. 95 Wn. App. at 854. The State conceded that the cross-examination questions were inappropriate. The court held that "error is harmless unless the improper cross-examination was sufficient to affect the outcome of the trial." *Lopez,* 95 Wn. App. 855-856.

In this case, even if the court determined that the cross-examination of Doctor Wollert regarding the Yakima case constituted improper impeachment, any error is harmless. These four questions regarding the Yakima County case were a small part of two days of cross-examination of Doctor Wollert in which his bias, faulty basis for his opinion, and the lack of scientific support for his methodologies were made clear to the jury.

b. The State's Questioning of Doctor Wollert Regarding the Yakima County Case Does Not Constitute A Comment on the Evidence

Article 4, section 16 of the Washington Constitution provides that "Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law." *State v. Lane,* 125 Wn.2d 825, 838, 889 P.2d 929(1995). The purpose of this constitutional prohibition is to prevent the trial judge's opinion from influencing the jury. *Lane,* 125 Wn.2d at 838. A statement by the court constitutes a comment on the evidence if the court's attitude towards the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. *State v. Lane,* 125 Wn.2d at 838; *State v. Hansen,* 46 Wn. App. 292, 730 P.2d 706 (1986). A court does not comment on the evidence simply by

giving its reasons for a ruling. *State v. Dykstra,* 127 Wn. App. 1, 110 P.3d 758, 761 (2005) (citing *State v. Cerny,* 78 Wn.2d 845, 855-856, 480 P.2d 199 (1971)).

Pouncy argues that the State's questioning of Doctor Wollert regarding the Yakima Court's findings amounted to a comment on the evidence. This argument fails. A similar argument to the effect that admission of a court's findings and conclusions constitute an impermissible comment on the evidence was soundly rejected in *State v. Gentry,* 125 Wn.2d 570, 638-639, 888 P.2d 1105 (1995).

In *Gentry,* a death penalty case, the defendant claimed that it was a comment on the evidence to allow admission of a judgment and sentence where the court had made findings and imposed an exceptional sentence for rape. The Court stated rejected this argument and noted that "admission of a judgment and sentence of a prior rape was not a comment on the evidence, it *was* the evidence." *Id.*, 125 Wn.2d at 639. The Court reiterated the well established principle that "the admission of evidence, standing alone, cannot be considered an unconstitutional comment on the evidence. " *State v.* Lord, 117 Wn.2d 829, 822 P.2d 177 (1991), *cert denied,* 506 U.S. 856, 113 S. Ct. 164, 121 L. Ed. 2d 122 (1992). Since a certified copy of a judgment and sentence is

"highly reliable" and the imposition of a prior exceptional sentence was relevant to the penalty phase, the findings and conclusions of the exceptional sentence were properly admitted. 125 Wn.2d at 638.

Similarly, in this case, allowing the State to cross-examine Doctor Wollert on the Yakima County case did not amount to a comment on the evidence. It was appropriate cross-examination for the State to question Doctor Wollert regarding a prior case in which the very same methods that he was using in this case were found not to meet basic standards of admissibility. This cross-examination did not in any way display the court's attitude towards the merits of the case. Moreover, it did not reflect the trial court's opinion. Rather, these cross-examination questions involved a different case and a different judge who findings directly relevant to the soundness of the expert's opinion in this case. Pouncy does not explain how he believes this displayed the trial judge's opinion in his case.

c. The State's Questioning of Doctor Wollert Regarding the Yakima County Case Did Not Prejudice Pouncy

Even if the court did determine that this cross-examination amounted to a comment on the evidence, there was no prejudice to Pouncy. If the record contains overwhelming untainted evidence to support each element of the charge, then the court may find that a judge's improper comment could not have influenced the jury. *State v. Lane,* 125 Wn.2d at 840.

In this case, there is overwhelming evidence to support each of the three criteria for civil commitment. Pouncy has a lengthy and violent history of raping women. Pouncy was given multiple opportunities to live free in the community and he reoffended every time. After being released the last time, Pouncy had the support of his wife, he had a job, and a comfortable place to live. Despite all of this support, Pouncy soon began "cruising" in his car, having sex with drug-addicted women, and ultimately he committed at least two additional rapes. All of this occurred in a fourteen-month time span.

Pouncy argues that prejudice resulted from the admission of these findings and conclusions because this case involved a "battle of the experts" and they "demolished the true value of Wollert's

testimony." *See Appellant's Brief at 16.* This argument ignores the fact that Doctor Wollert's testimony was not worth much to begin with.

In two days of cross-examination, Doctor Wollert 's methods and his opinions were shown to be deeply flawed. For example, Doctor Wollert acknowledged that the leading researchers in the field of sex offender recidivism soundly rejected his use of the "Null Hypothesis" and "Bayes Therom." 16RP 157-59. Moreover, his bias, lack of preparation and extreme overbilling were pointed out to the jury. The brief questioning regarding the Yakima County case did not "demolished" his testimony; it was merely another piece of information which reflected poorly on this expert's competence. Doctor Wollert's own testimony and his lack of scientific integrity are what "demolished" his own credibility.

2. POUNCY'S ATTORNEY WAS NOT INEFFECTIVE IN FAILING TO RAISE AN EVIDENTIARY OBJECTION TO THE QUESTIONING OF DOCTOR WOLLERT REGARDING THE YAKIMA COUNTY CASE

As a back up argument, Pouncy argues that this commitment should be reversed because his counsel was ineffective. In particular, Pouncy argues that his attorney's failing to

object to the Yakima County case on relevance grounds constituted ineffective assistance of counsel that warrants a reversal of this commitment.

In making this argument, Pouncy refers to the trial judge's comment that she would have excluded these findings and conclusions if Pouncy's attorney had objected on relevance grounds. *See Appellant's Brief at 17.* Pouncy argues that his attorney was ineffective because she made the wrong objection according to the trial judge --- that she should have objected on relevance grounds. Pouncy then claims that these findings and conclusions constitute hearsay, and that no hearsay exception applies. These argument's are addressed in turn below.

a. Pouncy's Attorney Was Not Ineffective

Washington courts have adopted the two-part test for ineffective assistance of counsel set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas,* 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). First, a defendant must show that defense counsel's representation was deficient, meaning that it fell below an objective standard of reasonableness based on consideration of all

circumstances. *State v. McFarland,* 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). Second, the defendant has the burden of showing that defense counsel's deficient representation prejudiced the defendant, *i.e.* there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *McFarland,* 127 Wn.2d at 334-335.

With regard to the first prong of *Strickland,* the courts make a strong presumption that counsel's representation was effective. *McFarland,* 127 Wn.2d at 335. "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." *Thomas*, 109 Wn.2d at 226; *State v. Brett,* 126 Wn.2d 136, 198, 892 P.2d 29 (1995). In order to determine the competency of counsel, the courts review the *entire record* below. *McFarland,* 127 Wn.2d at 335 (citing *State v. White,* 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The burden is on the defendant alleging ineffective assistance of counsel to show deficient representation based on the record established below. *McFarland,* 127 Wn.2d at 335.

If the defendant meets the burden for the first prong of the *Strickland* test, the claim will not be successful unless the defendant proves that the result of the proceeding would have been

different but for the counsel's deficient performance. *McFarland,* 127 Wn.2d at 337; *State v. Brett,* 126 Wn.2d at 200; *State v. Endrickson,* 129 Wn.2d 61, 79, 917 P.2d 563 (1996). The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *In re Woods,* 154 Wn.2d 400, 420-421, 114 P.3d 607 (2005) (citing *Strickland v. Washington,* 466 U.S. at 687).

In this case, Pouncy is attempting to bootstrap his argument regarding the cross-examination of Doctor Wollert to an ineffective assistance of counsel argument. When reviewing the entire record, it is clear that Pouncy's attorney provided an effective and vigorous defense. Pouncy does not meet either prong of the *Strickland* test.

First, Pouncy has not met his burden of showing that his attorney's representation "fell below an objective standard of reasonableness." Pouncy is in effect arguing that in this five-week trial, this one action - namely his attorney's failure to object on relevance grounds to the Yakima County cross-examination -- rises to the level of ineffective assistance of counsel. This argument fails. Pouncy had a vigorous and committed advocate during this lengthy trial. There is no serious argument that his attorney's representation "fell below an objective standard of

reasonableness." Therefore, Pouncy does not meet the first prong of the *Strickland* test.

Nor does Pouncy meet the second prong of the *Strickland* test. Given the fact that the State was entitled to cross-examine Doctor Wollert on the Yakima case, andit was a small part of a lengthy cross-examination, Pouncy cannot meet his burden of showing that this affected the outcome of the proceeding. As stated above, the State's evidence supporting the commitment in this case was overwhelming. The defense expert, Doctor Wollert, was basing his opinions on methodologies that were soundly rejected by the leading researchers in the field. Even if Pouncy's attorney had objected on relevance grounds and the State had been precluded from asking these questions, this would not have affected the outcome of this case.

b. The Yakima Court's Findings Regarding Doctor Wollert Were Relevant And Admissible On Cross-Examination

Rule 401 of the Washington Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without

the evidence" As Pouncy himself noted, expert testimony is critical in SVP trials. Doctor Wollert was retained to provide his opinion as to his diagnosis of Pouncy and the likelihood that Pouncy would commit future acts of sexual violence. By offering Doctor Wollert's diagnosis and risk assessment, Pouncy placed Doctor Wollert's competency and the quality of his opinions at issue.

The State is entitled to a complete and thorough cross-examine of Doctor Wollert and his opinions, the basis for his opinions, including the facts or data that he has relied upon in his opinion. ER 705. This includes cross-examining Doctor Wollert by exposing weaknesses in his credibility, methodologies, or in the information upon which his opinion is based.

The Yakima county case is made even more relevant by virtue of the fact that Doctor Wollert utilized the same methodologies that he used here. Specifically, Doctor Wollert concluded that based on the use of the "Null Hypothesis" and "Bayes Thereom", Pouncy did not meet criteria as a sexually violent predator. The leading researchers and experts in the field of SVP evaluations and risk assessments reject the use of these two methodologies in these types of forensic evaluations. 16 RP 157-159.

To suggest, as Pouncy does, that a finding such as this is not *relevant* to cross-examination is absurd. Doctor Wollert is being paid large sums of money[1] to come into court and testify that Pouncy does not meet criteria as a sexually violent predator and therefore should be *released into the community* --- an opinion with serious implications for community safety. The information on the Yakima County case is relevant to the jury's assessment of his credibility and competence.

Pouncy's claim that these findings are barred by the hearsay rule also fails. While the State did possess certified copies of the Yakima Court's findings and conclusions, the State did not introduce this document as an exhibit. Rather, the State simply used the document to support its good faith basis for asking the questions. Therefore, the hearsay objection falls short. Even if the State had admitted this document as evidence, it would be admissible as a certified copy pursuant to ER 803(a)(8). Certified copies of court documents such as judgments and sentences are "highly reliable." *Gentry,* 125 Wash. 2d at 637.

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[1] Doctor Wollert testified on cross examination that his fees on this case exceeded $40,000, including a total of 80 hours to draft his 16-page report. 16RP 79-85.

Finally, Pouncy argues that these findings were inadmissible under ER 608 (b), the evidence rule which bars use of extrinsic evidence of specific instances of misconduct. This argument also fails.

Cross-examination of an expert may include questions about an expert's professional misconduct, negligence or the like. This inquiry should be allowed if it is relevant:

> The argument for allowing such inquiry is that ER 608 can be interpreted as simply not addressing the question of whether an expert can be asked about conduct or incidents that suggest something about the quality of the expert's analysis. And since neither ER 608 nor any other rule addresses the issue, the court should resolve the issue on a case-by-case basis by reference to general principles of relevance. So if the inquiry is relevant, as it often is, it should be allowed

5B Wash. Prac. §705.7 n 2.6.

Courts analyzing the question of admissibility under ER 608(b) have held that a witness may be cross-examined regarding specific instances of conduct by the witness for purposes of attacking the witness's credibility. *Navarro de Cosme v. Hospital Pavia*, 922 F.2d 926, 933 (1st Cir. 1991). In *Navarro*, the trial court allowed the defense to question plaintiff's expert witness regarding the expert's testimony in an unrelated case that he had submitted inflated invoices for fees earned as an expert. *Navarro*, 922 F.2d at

932. The court also allowed questioning regarding the fact that the expert's notary license was suspended and that he had been a defendant in three medical malpractice cases. *Id.* In allowing this questioning, the trial court stated:

> An expert is a person who, due to his training, due to his education, due to his standing in the community, is allowed to come before a court and based upon that privilege, so to say, is allowed to give an opinion on something after the fact ... **The person under those circumstances has to come to court and has to submit to the rigor of qualifications which includes** not only the technical aspects ... but also on ... his standing in the community and **his performance as a physician** ...

Navarro, 922 F.2d at 932-33 (emphasis added). The First Circuit agreed and held that the evidence was relevant to the expert's credibility and was a proper subject of cross-examination. *Id.* at 933.

Similarly, in this case, Doctor Wollert must submit to the rigors of a well-developed cross-examination. This includes cross-examining Doctor Wollert regarding the Yakima County case in which his testimony did not meet basic standards of admissibility.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON THE DEFINITION OF PERSONALITY DISORDER

Trial courts have discretion in determining whether to give a proposed jury instruction. *In re Twining,* 77 Wn. App. 882, 895 (1995). Jury instructions are not erroneous if they are sufficient to allow the parties to argue their theory of the case, if they are not misleading, and if they properly inform the jury of the applicable law. "No more is required." *Seattle Western Industries v. David A. Mowat Co.,*110 Wn.2d 1, 750 P.2d 245 (1988); *In re Twining,* 77 Wn. App. 882 (1995).

In a criminal case, trial courts must instruct the jury on every element of the crime charged. *State v. Allen,* 101 Wn.2d 355, 678 P.2d 798 (1984). "Trial courts must define technical words and expression, but need not define words and expressions that are of ordinary understanding or self-explanatory." *State v. Brown,* 132 Wn.2d 529, 611 940 P.2d 546 (1997). A term is "technical" when it has a meaning that differs from common usage. *State v. Brown,* 132 Wn.2d 529, 611 (1997); *State v. Allen,* 101 Wn.2d 355, 358 (1984). This "technical term" rule is an attempt to ensure that criminal defendants are not convicted by a jury that misunderstands

the applicable law. *State v. Scott,* 110 Wn.2d 682, 690, 757 P.2d 492 (1988).

However, the "technical term" rule and the constitutional requirement for informing the jury of all elements of the crime charged are not identical. *Scott,* 110 Wn.2d at 690. "Failure to give a definitional instruction is not failure to instruct on an essential element." *Id.* As the court explained in *Scott*:

> ... we find nothing in the constitution as interpreted in the cases of this or indeed any court, requiring that the meanings of particular terms used in an instruction be specifically defined.

State v. Scott, 110 Wn.2d at 691.

Whether words used in an instruction require definition is a matter of judgment to be exercised by the trial judge. *State v. Guloy,* 104 Wn.2d. 412, 417, 705 P.2d 1182 (1985) (citing *State v. Schimmelpfennig,* 92 Wn.2d 95, 594 P.2d 442 (1979)). In *State v. Brown,* 132 Wn.2d at 611, an aggravated murder case, the appellant asserted that the trial court erred by not instructing the jury on the terms "in the course of" and "in furtherance of" and "in immediate flight." The appellant argued that these terms had specific technical meanings within the context of the case and should have been explained to the jury. The court concluded that

the trial court properly exercised it's discretion in refusing to define these terms. *Brown,* 132 Wn.2d at 612. Moreover, the court noted that the refusal to define these phrases did not constitute a due process violation because failure to give a definitional instruction is not failure to instruct on an essential element of the crime charged. *Id.*

Similarly, in *In re Twining,* 77 Wn. App. 882, 895 (1995), an SVP case, the appellant made the same argument that Pouncy makes here - that the court erred in not defining the term personality disorder. The court rejected this argument, noting that this decision was well within the trial court's discretion. *Id.* The *Twining* court distinguished the seminal case *State v. Allen,* 101 Wn.2d 355 (1984), by noting that personality disorder is not defined by statute, whereas the term at issue in *Allen* --- intent --- had a specific statutory meaning. *Id.*

In this case, the trial court properly exercised its discretion in refusing to define "personality disorder." The jury instructions were sufficient to allow the parties to argue their case, they were not misleading, and they properly informed the jury of the applicable law. The trial court was not required to define the term "personality disorder", as that term does not have a specific statutory meaning

that is different from common usage, and it has a well-accepted psychological meaning.

Pouncy argues that the court erred in not defining this term but provides no authority to support this argument. In fact, Pouncy spends a good part of his discussion addressing *In re Twining,* a Division III case in which the court rejects the very same argument made by Pouncy. Pouncy argues that *Twining* is wrongly decided, and that the court should decline to follow this opinion. Pouncy claims that the "jury was faced with the dilemma of having to hammer out a definition of personality disorder among themselves." *See Appellant's Brief at 27.*

This argument is not persuasive. There is no indication that the jury had to "hammer out" a definition of personality disorder, as this term has a very specific psychological meaning. Pouncy did not present any testimony which contradicted or took issue with the definition of the term personality disorder, as both the State and Respondent's experts defined the term in the same fashion.

Pouncy's reliance on *In re* Young, 122 Wn.2d 1, 857 P.2d 989 (1993) is also misplaced. In responding to a vagueness challenge to the SVP statute, the *Young* court stated that the term "personality disorder" has "a well-accepted psychological meaning."

Young, 122 Wn.2d at 50. However, there is no indication that the trial court in *Young* provided a jury instruction defining the term "personality disorder." Rather, the court relied on the fact that this term was well defined in the psychological profession, and that it was explained to the jury.

Pouncy argues that by not defining personality disorder, the experts in this case were allowed to define the law and technical terms for the jury. In support of this argument, Pouncy relies on *State v. Olmedo,* 112 Wn. App. 525, 532, 49 P.3d 960 (2002), and *State v. Clausing,* 147 Wn.2d 620, 56 P.3d 550 (2002). Both of these cases are distinguishable from the instant case.

In *Olmedo,* 112 Wn. App. at 532, the appellant was charged with unlawful storage of anhydrous ammonia. *Id.* The elements of the charge were knowing possession of this chemical in a container *not approved by the United State Department of Transportation or not constructed to meet state and federal industrial health and safety standards.* The court then refused the defendant's request to further define what these standards were. *Olmedo,* 112 Wn.2d at 529. At trial, the State's expert testified that he was familiar with the regulations for storing and handling this chemical, and that the propane tanks did not meet legal

requirements. *Id.* The court refused the defense request to define these legal requirements for the jury. Therefore, the statutory and administrative standards that the defendant was accused of violating were not spelled out for the jury.

Conversely, in this case, the legal standards at issue were defined for the jury. The term "mental abnormality" was defined for the jury because it had a specific statutory definition and it was not a commonly used psychological term. Moreover, in this case, there was no dispute about the definition of personality disorder, as both experts agreed on the definition.

State v. Clausing is also distinguishable from this case. In *Clausing,* the State's expert testified that the defendant-physician's prescriptions were no longer valid because his medical license had been suspended. *State v. Clausing,* 147 Wn.2d 620, 628 (2002). The court concluded that this testimony constituted a legal opinion, and that the expert should not be instructing the jury on the law. *Id.* Pouncy's case involved no such testimony. Both experts in Pouncy were asked to answer several questions, including whether Pouncy suffered from a mental abnormality and/or personality disorder. Both experts agreed on the definition of a personality disorder, and the court instructed the jury on the elements required for civil

commitment. Unlike the expert in *Clausing,* they were not providing a legal opinion about what the law provides, such as the legal consequence of a license suspension, but they were providing forensic opinions in response to the statutory standards in the SVP law.

The court in this case properly instructed the jury on the applicable law, and allowed the parties to argue their theory of the case. The court properly exercised its discretion in refusing to define the term personality disorder.

4. THE RIGHT TO JURY UNANIMITY WAS NOT VIOLATED BECAUSE THE STATE ONLY PRESENTED EVIDENCE OF ONE MENTAL ILLNESS WHICH MET THE DEFINITION OF MENTAL ABNORMALITY AND THE STATE MADE AN ELECTION

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. 1, Section 21; *State v. Ortega-Martinez,* 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994). A defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. *State v. King,* 75 Wn. App. 899, 902, 878 P.2d 466 (1994); *State v. Stephens,* 93 Wn.2d 186, 190, 607 P.2d 304 (1980). If the

prosecutor presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. *State v. Petrich,* 101 Wn.2d 566, 570, 683 P.2d 173 (1984); *State v. King,* 75 Wn. App. at 902. This rule is based on the notion that juror unanimity is not realized unless the jurors are clear on which acts they relied upon in determining guilt. *State v. King,* 75 Wn. App. at 902.

Courts in Washington have consistently held that when the State presents evidence of several acts that could support the charge, jury unanimity is achieved if the State makes an election as to which acts it is relying on. *State v. Crane,* 116 Wn.2d 315, 804 P.2d 10 (1991); *State v. Petrich,* 101 Wn.2d at 572 (the State may, in its discretion, elect the act upon which it will rely for conviction); *State v. King,* 75 Wn. App. 899, 902 (either the State must tell the jury which acts to rely on in its deliberations or the court must instruct). If the State chooses not to elect, a unanimity instruction must be given to ensure the jury's understanding of the unanimity requirement. *State v. Petrich,* 101 Wn.2d at 572.

The right to a unanimous jury trial may also include the right to express jury unanimity on the *means* by which the defendant is

found to have committed the crime. *State v. Ortega-Martinez.* 124 Wn.2d at 707. However, no unanimity is required if there is substantial evidence supporting each alternative means. *State v. Arndt,* 87 Wn.2d 374, 553 P.2d 1328 (1976); *State v. Crane,* 116 Wn.2d 315, 326, 804 P.2d 10 (1991). The rationale behind the "alternative means" analysis is that a particular expression of unanimity as to the means is not required because the court infers that the jury rested its decision on a unanimous finding as to the means. *State v. Ortega-Martinez.* 124 Wn.2d at 707.

Unanimity rules are applicable in SVP cases. *State v. Halgren,* 156 Wn.2d 795, 809, 132 P.3d 714 (2006). In *Halgren,* the court rejected the State's argument that unanimity requirements did not apply in SVP cases because they involved the respondent's mental status as opposed to specific acts. *Halgren,* 156 Wn.2d at 809. The court reasoned that since "the jury is being asked to find the existence of some fact as a component of placing the defendant in confinement", due process requires the application of unanimity. *Halgren,* 156 Wn.2d at 809.

After concluding that unanimity rules apply in SVP cases, the court then considered whether it should apply the alternative means framework set forth in *State v. Arndt.* Under the *Arndt* analysis, the

court determines legislative intent by considering (1) the title of the act; (2) whether there is a readily perceivable connection between the various acts set forth; (3) whether the acts are consistent or repugnant to each other; and (4) whether the acts inhere in the same transaction. *Halgren,* 156 Wn.2d at 721 (citing *State v. Arndt* and *State v. Berlin,* 133 Wn.2d 541, 947 P. 2d 700). The court concluded:

> The factors considered in *Arndt* and *Berlin* dictate that "mental abnormality" and "personality disorder" are alternative means for making the SVP determination. As in *Berlin,* in this case, a single statutory provision, RCW 71.09.020(16), contains both bases for determining whether a person is an SVP. In addition, because the result to be accomplished whether one has a mental abnormality or personality disorder is the same, commitment as an SVP, and because both mental illnesses are predicates for the SVP determination, the two mental illnesses are closely connected. Also, as Dr. Wheeler opined, these two means of establishing that a person is an SVP may operate independently or may work in conjunction. Thus, because an SVP may suffer from both defects simultaneously, the mental illnesses are not repugnant to each other may inhere in the same transaction.

Halgren, 156 Wn.2d at 811. The court concluded that no unanimity instruction was required because there was substantial evidence to justify a finding that Halgren had both a mental abnormality and a personality disorder. *Halgren,* 156 Wn.2d at 812.

Pouncy argues that his right to jury unanimity was violated because substantial evidence did not support each alternate means of proving the mental illness element. Specifically, Pouncy asserts that since the jury heard evidence relating to Pouncy's sexual attraction to children and past sexual abuse of children, the jury is "presumed to have considered evidence of pedophilia in reaching their verdict."[2] Pouncy goes on to argue that the jury is presumed to have considered this evidence, but the evidence was insufficient to support a diagnosis of pedophilia.

This argument is unpersuasive. The State did not present multiple "mental abnormalities" that could have been the basis for the commitment. The State was clear in the testimony and in argument that Pouncy suffered from only one mental abnormality and that was paraphilia NOS nonconsent. Doctor Packard specifically addressed pedophilia and concluded there was

[2] Pouncy's argument implies that it was somehow improper for the State to admit evidence of Pouncy's sexual abuse of children at trial. However, in an SVP proceedings, an offender's entire sexually deviant history is relevant to the issues before the court, namely whether they suffer from a mental abnormality or personality disorder, and whether they are likely to engage in predatory acts of sexual violence if not confined to a secure facility. The evidence of pedophilia was relevant in this case in terms of giving the jury a complete account of his criminal history, and also with respect to assessing Pouncy's claim that he had adequately addressed his sexual deviance in treatment. Since Pouncy had not been treated for pedophilia, and had not provided an offense cycle for sexual attraction to children or developed a relapse prevention plan for that offense

insufficient evidence to support the diagnosis. Therefore, no unanimity instruction was required because there was only one mental illness which fit the definition of mental abnormality presented to the jury.

Since the State did not present evidence of multiple mental abnormalities, it was not required to make an election to the jury. Nevertheless, the State *did* make such an election. In both opening and closing argument, the State argued to the jury that Pouncy suffers from paraphilia NOS nonconsent and that this constitutes a mental abnormality under the SVP law. Therefore, the State made a clear election in terms of what facts it was asking the jury to rely on in finding that Pouncy met the SVP criteria. In fact, the State made it clear that there was not enough evidence to support a diagnosis of pedophilia. 18RP 68. The entire discussion of the mental abnormality prong of the SVP law was applying the law to the diagnosis of paraphilia NOS nonconsent.

Pouncy's argument that the jury could have found that he suffered from pedophilia and based their commitment decision on this mental illness is not borne out by the evidence. In the direct

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cycle, the State was entitled to introduce evidence of his sexual attraction to children to rebut his treatment claims.

examination of Doctor Packard, the State elicited testimony regarding all of Pouncy's sexually deviant history - including his rape of a 13-year-old girl, his molestation of children and his attempt to get two elementary school girls into his car. All of Pouncy's sexually deviant history was relevant to the SVP evaluation done by Doctor Packard and he explained the significance of this history in terms of the diagnosis and the risk assessment. Ultimately Doctor Packard concluded that there was insufficient evidence of pedophilia to support a diagnosis under the Diagnostic and Statistical Manual IV Revised. Doctor Packard applied the legal standard of "mental abnormality" to the diagnosis of paraphilia NOS nonconsent and concluded that it appeared to fit the legal definition of such a disorder. Doctor Packard provided no such testimony with respect to pedophilia.

Since the State only presented evidence of one mental abnormality, and there was substantial evidence to support a finding that Pouncy suffered from both a mental abnormality and a personality disorder, no unanimity instruction was required.

D. CONCLUSION

For the foregoing reasons, the State respectfully requests an order affirming Pouncy's civil commitment.

DATED this 2 day of ~~June,~~ July 2007.

Respectfully submitted,

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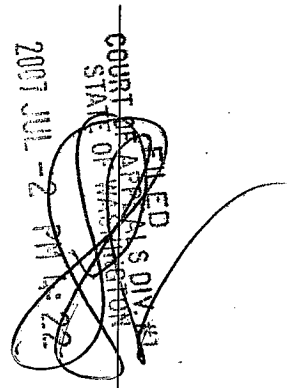

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re the Detention of:	NO. 59034-1-I
CURTIS POUNCY,	DECLARATION OF SERVICE
Respondent.	

I, LEEANNE ZWINKEL, being first duly sworn on oath, deposes and says:

On July 2, 2007, I arranged for service a copy of the *Brief of Respondent,* 59034-1-I, by ABC Messenger Service to the following:

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DATED this 2nd day of July, 2007.

By: _____
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